

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 27, 2009 Session

STATE OF TENNESSEE v. JONATHAN LEE ADAMS

Appeal from the Criminal Court for Knox County
No. 78356A Kenneth F. Irvine, Jr., Judge

No. E2008-00400-CCA-R3-CD - Filed July 22, 2009

A Knox County jury convicted the defendant, Jonathan Lee Adams, of one count of first degree felony murder, one count of especially aggravated robbery, a Class A felony, one count of aggravated robbery, a Class B felony, and one count of especially aggravated burglary, a Class B felony. The trial court sentenced the defendant to consecutive terms of life in prison for felony murder and twenty years as a Range I, standard offender for especially aggravated robbery. The court imposed concurrent sentences for the other convictions. On appeal, the defendant argues that the trial court improperly imposed consecutive sentences and that he was improperly convicted of especially aggravated burglary when the element of serious bodily injury was an element of both especially aggravated robbery and especially aggravated burglary. After reviewing the record, we conclude that the trial court improperly imposed consecutive sentences and that the defendant should not have been convicted of especially aggravated burglary. We therefore reverse the defendant's especially aggravated burglary conviction and remand the case to the trial court for imposition of concurrent sentences, entry of a judgment of conviction for aggravated burglary, and imposition of a three-year sentence as to that offense.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed in Part;
Case Remanded**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Keith E. Lowe (on appeal) and Russell T. Greene (at trial), Knoxville, Tennessee, for the appellant, Jonathan Lee Adams.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Procedural History

The record reflects that in October 2003, the defendant was indicted, along with co-defendants Kenneth Daniel Hunter and Christopher Shawn Stidham, on two counts of first degree felony murder (with the underlying felonies of burglary and robbery) and one count each of especially aggravated robbery, aggravated robbery, and especially aggravated burglary. The defendants were charged following a March 25, 2003 home invasion at the residence of Rhonda Robinson, during which Robinson's twelve-year-old son, Cody Thomas, was shot to death. The defendants' cases were severed, with Adams being the only defendant of the three who did not plead guilty.

Although the defendant is not challenging the sufficiency of evidence on appeal, we will provide a summary of the trial testimony to provide context. Robinson testified that on March 25, 2003, she lived in a home in Knoxville with her son Cody and Jessica Hollifield, a family friend. That night, two of her son's friends, Bobby Shumate and Brandon Masterson, spent the night at her house, with Shumate sleeping in Cody's bedroom and Masterson sleeping in the kitchen, which adjoined Cody's bedroom. She said that her son kept "two or three" guns in his room, with some of the guns being handguns which he kept in his dresser and another being a rifle which he kept in his closet.

Robinson said that she went to bed between 11:00 and 11:15 that evening. Some time after she went to sleep, she awoke when she heard a noise. Feeling scared, she attempted to call 911 but was pushed onto her living room floor by a man carrying a gun. The man, whose face was covered, told Robinson to remove her jewelry, which she did. During this incident, the assailant held a shotgun to the back of Robinson's head and kept his foot on her back. At that time, Robinson, who screamed, "Help, I'm being robbed," saw two other men, including the defendant, whom she described as "big" and wearing glasses. After a while, Robinson heard two gunshots, which she described as "quick" and sounding like they came from the same gun, coming from the hall near her son's room. Robinson said that she saw the defendant in the hall when the shots went off, although she was unsure whether the defendant or the other assailant fired the shots.

After the shots went off, the three assailants ran outside the house. One of the men passed Robinson, who grabbed the man by his shirt. She said that the man, whose identity she could not ascertain, "drug [her] down the street hitting [her] in the face with a shotgun." She said that she ultimately let go of the man because he was beating her "so bad[ly] [that she] couldn't take it anymore." Robinson said that the assailants took a necklace and "[a] lot of gold jewelry and rings" that had belonged to her great-great grandmother from jewelry boxes inside the home.

Brandon Masterson, who was fifteen years old in March 2003, testified that he, the victim, and Bobby Shumate had spent most of March 25, 2003 together playing basketball and smoking

marijuana, and that they spent the night at Robinson's house. That night, as Masterson lay awake in bed in the kitchen, which adjoined Cody Thomas's room, he heard a "big crashing noise" and then heard Robinson scream "Help. Help. I'm being robbed" from the living room. Masterson woke Cody and told him that his mother was screaming. Masterson saw Cody open a dresser drawer; as soon as Cody opened the drawer, Masterson heard a "loud gunshot" and saw Cody put his hand to his head and fall onto the floor. Shumate, who was also fifteen years old the night of the shooting, also testified, with the substance of his testimony largely mirroring Masterson's. Shumate testified that he heard two gunshots in rapid succession. He acknowledged that he told an investigator who worked for the defendant's trial counsel that Cody Thomas could have fired a shot at the assailants. However, in an interview with police shortly after the incident, Masterson did not tell the police that Cody fired a shot.

Bryan Davis, an investigator with the Knoxville Police Department, investigated Cody Thomas's death. He said that the investigation initially focused on another suspect, but the police soon focused their attention on the defendant, who came to the police station to talk about another shooting. The defendant, who was the supposed victim of the other shooting, told the police that he knew nothing about the Thomas shooting and that his own gunshot wound was an accidental self-inflicted wound. Investigator Davis then spoke to Robinson, who helped the police develop a sketch of one of the perpetrators. Investigator Davis, noting that the composite sketch resembled the defendant—particularly in the eyes, glasses, and facial features—asked the defendant for permission to take his photograph and fingerprints. The defendant agreed, and Investigator Davis placed the defendant's photograph in an array which he showed to Robinson. Upon viewing the array, Robinson became "extremely upset" and picked the defendant's photograph "[a]lmost immediate[ly]."

The police then took a written statement from the defendant, who waived his Miranda rights. In the statement, the defendant wrote that around 8:15 the evening of March 25, 2003, he received a call from Hunter, who requested the defendant's help in performing some unnamed task. The defendant then went to Hunter's house. Hunter asked the defendant for help in robbing a drug dealer's house. The defendant told Hunter that he did not want to rob anybody, but after Hunter kept telling the defendant that he would make money and would not get into trouble, the defendant agreed to help Hunter and Stidham, who was also present at Hunter's house.

According to the defendant, the three men then went to Robinson's residence. Stidham knocked on the door, and when Robinson opened it, Stidham forced her onto the floor and the two other men went inside. At one point, Hunter kicked open a door, at which point a "kid" shot at Hunter, who returned fire. The defendant, Stidham, and Hunter then left the apartment and went in separate directions, with the defendant going to a friend's apartment. While at the apartment, the defendant received a telephone call from Hunter and Stidham, who told him that they had recovered two ounces of marijuana and \$50.00 from Robinson's residence. The men agreed to split the proceeds. A while later, the defendant attempted to leave the apartment; as he left, his friend handed him his gun, which was not the one the defendant had carried at Robinson's house. The defendant's gun went off, hitting the defendant in the leg. The defendant's friend then took him to the hospital.

Knoxville Police Department Investigator Tommy Reagan, a crime scene investigator, testified that he swabbed both of Cody Thomas's hands for gunshot residue and sent the swabs to the Tennessee Bureau of Investigation (TBI) crime lab for testing. TBI Special Agent Laura Hodge, who examined the gunshot residue test, testified that "[e]lements indicative of gunshot residue were absent" from the victim's hands, although the test results could not "eliminate the possibility that the [victim] could have fired, handled, or was near a gun when it fired."

Janice Gangwer with the Knoxville Police Department testified that she also investigated the crime scene. She said that she found a bullet hole in a doorframe in the victim's bedroom; after pulling the wall apart, she found a bullet. She said that the bullet was fired "from the general direction of the door that led from the [victim's] bedroom to the hallway," although she acknowledged that there was "not enough information to determine the exact height or the exact location of the gun when it was fired." Officer Gangwer sent the bullet to the TBI crime lab for testing. TBI agent Robert Royse testified that he examined both the bullet taken from the victim's bedroom and a bullet removed from the victim's head during the autopsy conducted by then-Knox County medical examiner Dr. Sandra Elkins. Agent Royse testified that both bullets were .32 caliber Smith and Wesson "long" bullets, which were typically fired from a revolver. He said that because both bullets were damaged, he was unable to determine conclusively whether the bullets were fired from the same gun.

The defendant was the only witness to testify on his behalf. His testimony regarding the events of March 25, 2003, was largely consistent with his statement to police, summarized above. The defendant said that he agreed to take part in the burglary after Stidham and Hunter assured him that "it would be an easy hit" and that nobody would be at the house. He said that Stidham and Hunter wore bandanas and gloves but that he did not wear any disguise that evening. He said that the three men carried handguns, with one being a .32 caliber weapon and the other being a .38 caliber weapon; he was unsure about the third gun.

The defendant said that Stidham was the first person to enter the house and that he forced Robinson onto the floor. The defendant and Hunter then went through the house, with the defendant grabbing a purse from one room of the house and Hunter going down a hallway and kicking open a door to another room. After Hunter kicked open the door, he heard a "bang" and saw "a flash from a gun." According to the defendant, the person inside the room shot at Hunter, who fired once in return. The three men then left the house.

Later that night, the three men met at Hunter's house to split the proceeds from the burglary. According to the defendant, Hunter was "worried about [Cody Thomas]. He wasn't sure if he hit the kid or not." Stidham told Hunter "not to worry about it, that [the victim] was all right. Nobody [had] seen [them], nobody knew nothing." The defendant went to his friend Josh Hall's house, at which point he accidentally shot himself in the leg. Hall then took the defendant to the hospital; while at the hospital, he was interviewed by officers from the Knoxville Police Department.

After the defendant was released from the hospital, he spoke with Hunter, who told him that Cody Thomas was dead. The defendant said that he was "shocked" and felt "real[ly] nauseated to

my stomach that the boy was dead. I would have traded places with him right then was all I could think about.”

On cross-examination, the defendant acknowledged that he lied to the police when he told them that he did not have a gun during the incident. He admitted that he later told the police that Stidham and Hunter had given him a gun prior to the incident. He also acknowledged that although he had testified on direct examination that he did not know why he went over to Hunter’s residence, he had told police he went to Hunter’s house because Hunter had asked if the defendant wanted to “make some money.” He also said that he and the other two assailants did not discuss kicking in the door to Robinson’s house; when asked how he thought the three men would get into the house, the defendant replied, “The lady would open the door.”

ANALYSIS

Initially, although raised by neither party, we note that this case is fraught with procedural problems. The record reflects that the judgments of conviction in this case were entered on November 1, 2007. The trial court entered an amended judgment of conviction on Count 5, especially aggravated burglary, on November 7, 2007. The defendant did not file a motion for new trial until January 25, 2008, beyond the thirty-day limit for filing a new trial motion established by Rule 33(b) of the Tennessee Rules of Criminal Procedure. The trial court held a hearing on the motion on February 8, 2008; at the end of the hearing, the trial court denied the motion. On February 19, 2008, the defendant filed a notice of appeal.

The thirty-day filing deadline of a motion for new trial is mandatory, jurisdictional, and may not be extended. See Tenn. R. Crim. P. 33(b), 45(b); State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997). Consequently, “[a] motion for new trial which is not timely filed is a nullity.” State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). Subsequent review or considerations by the trial court or agreements of parties to hear a late-filed motion will not validate the motion for the purposes of appellate review. Id.; State v. Davis, 748 S.W.2d 206 (Tenn. Crim. App. 1987). Failure to file a timely motion for new trial will result in the waiver of all appellate issues that would result in the granting of a new trial. Dodson, 780 S.W.2d at 780; State v. Williams, 675 S.W.2d 499 (Tenn. Crim. App. 1984). Although this court cannot review those grounds upon which a new trial was sought, it may review those issues which would result in dismissal. Tenn. R. App. P. 3(e); Williams, 675 S.W.2d at 501; see also State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980).

Rule 4(a) of the Tennessee Rules of Appellate Procedure requires the filing of a notice of appeal within thirty days of the entry of judgment or, pursuant to Rule 4(e), the entry of an order denying motion for new trial. Because the defendant’s motion for new trial was a nullity, it did not toll the thirty-day period for filing the notice of appeal. Therefore, the notice of appeal in this case, which was filed long after the judgments of conviction became final, was also untimely. See, e.g., State v. Patterson, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997); Davis, 748 S.W.2d at 207. The timely filing of a notice of appeal is not a prerequisite to the jurisdiction of this court, and this court may waive the requirement in the interest of justice. Tenn. R. App. P. 4(a). However, waiver is not

automatic and should only occur when “the interest of justice” mandates waiver. See State v. Rockwell, 280 S.W.3d 212, 214 (Tenn. Crim. App. 2007). If this court were to summarily grant a waiver whenever confronted with an untimely notice of appeal, the thirty-day requirement of Tennessee Rule of Appellate Procedure 4(a) would be rendered a legal fiction. Id.; see also Michelle Pierre Hill v. State, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App. Feb. 13, 1996).

In a related case in which a defendant filed an untimely motion for new trial, which in turn rendered her notice of appeal untimely, we noted that “[i]n order to secure review of issues relating to the sufficiency of the evidence and sentencing, a timely filed notice of appeal must occur, or a waiver of the timely filed notice of appeal must be sought and obtained in this court.” State v. Heather Massengill, No. E2006-02602-CCA-R3-CD, 2007 WL 2019462, at *2 (Tenn. Crim. App. May 12, 2008); no perm. app. filed. In the instant case, as in Heather Massengill, the defendant did not seek a waiver of the timeliness requirement for the notice of appeal. However, unlike Heather Massengill, in this case the State did not seek to dismiss the appeal based upon the untimely notice of appeal. Furthermore, in the instant appeal the defendant raises only two issues. First, he argues that the trial court improperly imposed consecutive sentences; this issue is not waived by the untimely motion for new trial. In his second issue, he asserts—and the state agrees—that he was improperly convicted of especially aggravated burglary. Accordingly, in the interest of justice we will waive the untimeliness of the notice of appeal and consider this appeal on its merits.

Consecutive Sentencing

The defendant first argues that the trial court erred by ordering him to serve his twenty-year sentence for especially aggravated robbery consecutively to his life sentence for first degree murder.¹ The State replies that the trial court’s imposition of consecutive sentences based upon its determination that the defendant was a “dangerous offender” was supported by the record. After reviewing the record, we agree with defendant.

An appellate court’s review of sentencing is de novo on the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all

¹The trial court ordered the defendant’s eight-year sentences for each of his other two convictions—one count each of aggravated robbery and especially aggravated burglary—to be served concurrently. As will be explained below, we are modifying the especially aggravated burglary conviction to a conviction for aggravated burglary.

relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that “[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(4). When imposing consecutive sentences based on the defendant’s status as a dangerous offender, the trial court must, “in addition to the application of general principles of sentencing,” find “that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.” State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). In all cases where consecutive sentences are imposed, the trial court is required to “specifically recite [on the record] the reasons” behind imposition of consecutive sentences. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

In finding that consecutive sentencing based upon the “dangerous offender” provision was appropriate in this case, the trial court referenced the statutory language and applied the facts of the case to the statutory language:

What happened that day in that house is . . . a terrible thing. Whenever you in the middle of the night . . . go into someone’s home where multiple weapons are employed by the people that are involved, and you had one of those weapons, I think that does show little or no regard for human life. . . . It does happen all too often when people break into someone’s house and do that. And there was not hesitation about committing the crime and certainly the risk to human life was high when three men go in there with firearms into a situation. They take them for a reason, because they believe there could be firearms on the other side.

As relevant to the Wilkerson consideration of whether the defendant’s sentences reasonably related to the severity of his offenses, the trial court found that a sentence of life plus twenty years was “sufficient based upon the severity of the offense to punish you for what has happened in this case, and that any additional time would not be necessary to do that.” The trial court did not, however, make a conclusive finding regarding the Wilkerson consideration of whether an extended sentence was necessary to protect society against the defendant’s further criminal behavior. Accordingly, our review of the trial court’s sentencing determination is de novo with no presumption of correctness.

The defendant argues two bases for his assertion that the trial court improperly imposed consecutive sentences. One assertion is that in light of the principles of sentencing, the circumstances of this case do not warrant consecutive sentences. In support of this assertion, the defendant states that although he possessed a firearm during the incident, “there [was] no evidence produced that suggested that [he] ever pointed the firearm at anyone or threatened anyone with the firearm.” He also notes that after refusing Hunter’s initial request to burglarize Robinson’s house,

he agreed to participate only after being pressured by Hunter and Stidham and believing that nobody would be inside the house. Furthermore, citing to the Tennessee Supreme Court's opinion in Gray v. State, 538 S.W.2d 391, 393 (Tenn.1976), he argues that the trial court "found [him] to be a dangerous offender based solely on the fact that he was convicted of several dangerous offenses," which was impermissible given that the General Assembly has "already [established] increased penalties for inherently dangerous crimes." However, the record reflects that although Stidham and Hunter may have put some pressure on the defendant to participate in the burglary, such pressure was not so overwhelming as to lessen the defendant's culpability in agreeing to join in his associates' criminal enterprise. Also, although the defendant testified on direct examination that he agreed to burglarize the house believing that the house was empty, he carried a gun, which presumably would have been unnecessary in an empty house. Furthermore, upon discovering that Robinson was inside the house, he continued into the house. The defendant's testimony that he believed the house would be empty conflicted with his testimony on cross-examination, in which he said that he believed "the woman," meaning Robinson, would open the door to the house. In light of the circumstances of these offenses, we agree with the trial court's findings that the defendant's actions reflected little regard for human life and no hesitation about committing the offense when the risk to human life was high.

The defendant also argues that he did not qualify as a dangerous offender because the circumstances of the instant offense do not comport with the factors established in Wilkerson. The defendant argues that an effective life sentence reasonably relates to the seriousness of his offenses. However, we agree with the trial court that the circumstances of the instant offenses, outlined above, were such that a sentence of life plus twenty years reasonably related to the seriousness of the offenses.

A more difficult consideration is whether the defendant's sentences were necessary to protect society from his further criminal conduct. This court has suggested that "[a]menability to rehabilitation relates directly to [the] protection of the public factor and may, on occasion, be determinative of whether the concurrent or the consecutive sentence should be imposed." State v. Donald Mitchell Boshears and Ronald Dewaine Morrow, III, No. 01C01-9412-CR-00402, 1995 WL 676402, at *5 (Tenn. Crim. App. Nov. 15, 1995) (citing Tenn. Code Ann. § 40-35-103). The defendant's youthfulness and lack of a criminal record may also establish that the defendant is not a threat for continued criminal behavior—and, therefore, that an extended sentence is not necessary to protect the public from the defendant. State v. Tadarly Darnell Shipp, No. 03C01-9907-CR-00312, 2000 WL 290964, at *4 (Tenn. Crim. App. Mar. 21, 2000). However, "otherwise favorable factors" supporting a defendant's assertion that he does not present a continued threat to the public "may be offset in an appropriate case by the circumstances of the offense and the dangerous offender's lack of remorse." Id. (citing State v. Pike, 978 S.W.2d 904, 928 (Tenn. 1998) (appendix); State v. Martin Palmer Jones, No. 03C01-9803-CR-00084, 1999 WL 93144, at *6 (Tenn. Crim. App. Feb. 25, 1999)).

At the sentencing hearing, the trial court stated:

[A]s I read the case law [regarding consecutive sentencing based upon dangerous

offender status], I think it's talking about at the time of this offense, not at—throughout the person's entire life.

And I have, Mr. Adams, read all of the letters that have been submitted on your behalf and, certainly, you have a number of people that are being very supportive of you. And you have accomplished a number of things since this incident. And I think if the standard was are you today a dangerous offender as you sit here right now, I would not be able to apply this. But what I have to look at is what happened that day when these offenses happened when I'm deciding whether these should be served consecutively, were you a dangerous offender. And on that day, sir, I'm going to find that you were.

As the trial court referenced, at the sentencing hearing the defendant introduced eleven letters written by the defendant's family members, friends, and other acquaintances. The letters noted that since the defendant committed these offenses, he had stayed out of trouble, maintained steady employment, and began regularly attending church. The presentence report indicates that the defendant worked as shop foreman at the Joe Hill Company from July 2004 until September 2007.² The defendant also had no criminal record before committing the instant offenses and was twenty-one years old when these offenses occurred. In our view, the evidence in this case does not establish that the sentence imposed is necessary to protect society from future criminal acts by the defendant. Although the trial court observed that the defendant was a dangerous offender at the time he committed his offenses, any person who commits a felony murder during a home invasion is extremely dangerous at that time. Contrary to the trial court's findings, however, the commission of multiple violent felonies does not, standing alone, subject the defendant to consecutive sentencing. Rather, Wilkerson and its progeny have established that the "dangerous offender" provision applies only to those defendants from whose future criminal conduct the public needs protection. The facts of this case and the trial court's finding that the defendant was not a "dangerous offender" as of the sentencing date support this court's conclusion. Accordingly, we remand this case to the trial court for the imposition of concurrent sentences for all convictions.

Defendant's Especially Aggravated Burglary Conviction

The record reflects that the defendant was convicted of especially aggravated robbery as charged in Count 3 of the indictment and especially aggravated burglary in Count 5 of the indictment. In both counts, the serious bodily injury of victim Cody Thomas was listed as an element of the offense. See Tenn. Code Ann. §§ 39-14-402(a)(1), 39-14-404(a)(1) and (2) (as relevant to this case, especially aggravated burglary is committed by a person "who, without the effective consent of the property owner" enters a habitation "with the intent to commit . . . theft," and in which "the victim suffers serious bodily injury"); see also id. § 39-13-401 (defining especially aggravated robbery as "the intentional or knowing theft of property from the person of another by

²In the presentence report, the defendant indicated that he resigned from the position, and the employer indicated that the defendant's position had been "cancelled."

violence or putting the person in fear” which is “[a]ccomplished with a deadly weapon” and in which “the victim suffers serious bodily injury”). The defendant argues that the trial court erred by entering a judgment of conviction for especially aggravated burglary where the serious bodily injury of victim Thomas was an element of both this offense and especially aggravated robbery. The State agrees with the defendant, as does this court.

A defendant’s conviction for especially aggravated burglary in addition to the other offenses is precluded by Tennessee Code Annotated section 39-14-404(d) which states that “[a]cts which constitute an offense under this section may be prosecuted under this section or any other applicable section, but not both.” See, e.g., State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993); State v. Oller, 851 S.W.2d 841, 843 (Tenn. Crim. App. 1992). The practical import of subsection (d) is that the defendant could not have been found guilty of both especially aggravated burglary and especially aggravated robbery where the serious bodily injury of Cody Thomas was an element of both offenses. We therefore conclude that the trial court erred by convicting the defendant of especially aggravated burglary. Accordingly, we reverse that conviction and remand the case to the trial court for entry of a judgment of conviction for aggravated burglary, a Class C felony. Given that the trial court imposed a minimum sentence of eight years for the defendant’s especially aggravated burglary conviction, on remand we instruct the trial court to enter a three-year sentence for the defendant’s aggravated burglary conviction. See Tenn. Code Ann. § 40-35-112(a)(2) and (3) (for defendant sentenced as Range I offender, sentence range for Class B felony is eight to twelve years; for Class C felony, three to six years).

CONCLUSION

Upon consideration of the foregoing and the record as a whole, we conclude that the trial court erred by imposing consecutive sentences and by convicting the defendant of especially aggravated burglary. We therefore remand the case to the trial court for the imposition of concurrent sentences, entry of a judgment of conviction for aggravated burglary, and imposition of a three-year sentence for that offense.

D. KELLY THOMAS, JR., JUDGE